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LIABILITY OF COMMON CARRIERS UNDER THE ACT TO REGULATE COMMERCE

The liability of common carriers for loss, damage, or injury to shipments has always been a fertile source of litigation in the courts, and particularly in this country. The importance of the subject both to carriers and shippers is manifest. One element in furtherance of such controversies has been the varying conditions in the different kinds of bills of lading; another has been the volume of trade and commerce, and a third has been the conflicting decisions of the courts, even where the bill of lading conditions have been identical in language.

The first attempt by Congress to deal with the subject in so far as rail carriers were concerned[1] was by the Act of June 29, 1906. By that act there was inserted as a part of the act to regulate commerce an enactment, which has come to be known as the Carmack amendment.[2]

There have been numerous decisions by the Supreme Court passing on this amendment. Its constitutionality has been

[1] Secs. 4281 to 4289, inclusive, Revised Statutes, U. S., and Act Feb. 13, 1893 (Harter Act), provide with respect to limitation of liability of common carriers by water.

[2] The Carmack amendment reads:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the

affirmed and the advantage of the public policy as declared by Congress therein has been pointed out.[3]

By the Act of March 4, 1915, the first paragraph of the Carmack amendment was changed so as to read:

> "That any common carrier, railroad, or transportation company subject to the provisions of this act receiving property for transportation from a point in one state or territory or the District of Columbia to a point in another state, territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one state, territory, or the District of Columbia to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such

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liability hereby imposed: *Provided,* That nothing in this section shall deprive the holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

[3] The leading cases are: *Atlantic Coast Line R. Co. v. Riverside Mills,* 219 U. S. 186; *Adams Exp. Co. v. Croninger,* 226 U. S. 491; *Wells Fargo v. Neiman-Marcus,* 227 U. S. 469; *Boston & Maine v. Hooker,* 233 U. S. 469; *Atchison, Topeka & Santa Fe v. Robinson,* 233 U. S. 173; *Missouri, Kansas & Texas v. Harris,* 234 U. S. 412.

property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided, however,* That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

It will be observed that in the recent enactment there is much more language than in that for which it is substituted; there are additional provisions to be found in the three last provisos. It is manifest even from a casual reading that the first sentence of the Cummins amendment may be justly criticised for its patent ambiguity due to surplusage, tautology, and redundancy.

Since the passage of the Cummins amendment there has been much doubt and controversy concerning the interpretation thereof; many doubts have been raised from selfish motives. The Interstate Commerce Commission, whose duty it is to interpret and construe in the first instance,[4] after a hearing on the subject

[4] If the Commission err in its interpretation, resort may be had to the courts (*I. C. C. v. Humbolt SS. Co. ex rel.,* 224 U. S. 474).

expressed tentatively its views[5] and has made a report in respect thereto (No. 49, Ex parte; 33 I. C. C. 682). With the views there expressed many attorneys, both representing carriers and shippers, are not in accord, particularly in respect to the first proviso.

There is no apparent controversy concerning the meaning of that part of the Cummins amendment reading:

> "*Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

There may be some doubt concerning the proviso relating to a carrier's rule making the limitation of filing suits for claims two years. It is true that a period of limitation for filing claims, as provided by a carrier's rule, has been upheld,[6] but a limitation in respect to instituting suits seems to be granting too great powers. Suits against carriers must now be brought within two years; suits by carriers for undercharges are governed by the state statutes of limitations.[7]

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[5] "The Commission has been urged to some expression in the premises. It has held a hearing on this subject, and the questions there discussed have been argued on briefs. From the best information it has been possible to obtain and the consideration it has been able to give this matter within the limited time available, the Commission expresses tentatively the views hereinafter indicated." (33 I. C. C. 685.)

Commissioner Hall concurred in the report, but dissented as follows: "I concur in this report, but do not agree with the construction placed upon the proviso in the Cummins amendment in so far as it extends the exception created by the proviso beyond the meaning of the words used in their usual sense." (33 I. C. C. 698.)

[6] *Missouri, Kansas & Texas Ry. v. Harriman Bros.,* 227 U. S. 657.

[7] The Interstate Commerce Commission in its 27th and 28th Annual Reports recommended legislation to make a uniform statute of limitations, three years. In the present Congress several bills for the purpose are pending, including H. R. 651 by Mr. Keating.

It may be noted in passing that where the amendment as a whole uses the words *"Provided further"* the words following are a distinct, although related provision; and, when the term *"Provided, however,"* is used, the words following indicate an exception to a general rule as stated in the language immediately preceding. This distinction is in line with and seems to mark the boundaries of an exception to a general rule and an independent provision. The net effect of *"Provided further"* is *"and"*; and an exception to a general rule is introduced by *"Provided, however"*. Whether this selection of terms was by design cannot, of course, be stated; nevertheless, it serves to aid in the interpretation and construction of the enactment.

Probably no better way in which to begin to consider the meaning of that part of the enactment in serious controversy, namely, the body and first proviso of the amendment, is to consider what was the situation prior to its enactment; and, in the pending matter, inasmuch as the Carmack amendment and the Cummins amendment are in respect to the rule of liability for common carriers much the same, it will be found profitable to begin with the situation as it was shortly prior to the passage of the Carmack amendment, June 29, 1906.

At that time Congress had not legislated with respect to the liability of carriers by rail.[8] Their liability for loss, damage and injury to property entrusted to them had been determined either by the general common law as declared by the Supreme Court of the United States, or by the supposed policy of a particular state, or by the statute law of a particular state.[9] There was therefore no uniformity, for the three methods were and could but be essentially different. Uniformity could only be achieved when Congress had acted. And Congress not having acted in this behalf, state statutes, policies and decisions determined the liabilities even with respect to interstate shipments. When Congress legislated all state laws and policies were superseded.[10]

Congress now having acted, it will not be profitable or advantageous to consider the liability of carriers as determined by the different states or enter into any consideration of the conflict

[8] Congress had legislated with respect to the liability of carriers by water; see note 1, *supra.*

[9] *Adams Express Co. v. Croninger,* citing *Hart v. Penn. Ry.,* 112 U. S. 331; *Penn. R. R. v. Hughes,* 191 U. S. 477; *Chicago, etc. Railroad v. Solan,* 169 U. S. 133.

[10] *Adams Express Co. v. Croninger,* 226 U. S. 491.

of state decisions. Undoubtedly the Cummins amendment will and should be interpreted in the light of the general common law and with an eye single to the interpretation of its forerunner, the Carmack amendment. Although the liability of common carriers is an extraordinary one, yet in "a fair, just and reasonable agreement"[11] the carrier might under the general common law limit its liability in respect to:

I. The initial carrier, or the carrier on whose line the loss, damage or injury might occur:

II. One or more causes[12] by reason of which loss, damage or injury might come to the goods, which are:

(*a*) those arising from acts of God;
(*b*) those caused by the public enemy;
(*c*) those arising from the acts of public authority;
(*d*) those arising from the acts of the shipper;
(*e*) those arising from the inherent nature of the goods;
(*f*) those arising from the negligence of the carrier.

III. The amount for which the carrier would hold itself liable, in the event the loss, damage or injury was occasioned by or where it had not exempted itself.

Within these three fields the carrier might reserve its rights in respect to liability; in two it could exercise its powers fully; in one it had under all decisions only limited powers.

The carrier most frequently entirely limited its liability for loss, damage or injury to its own line; the initial and succeeding carriers after they had severally accomplished the transportation over each of their rails became mere forwarders,[13] and were no longer liable as common carriers.

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[11] *Hart v. Penn. Ry.*, 112 U. S. 331: "It is just and reasonable that such a contract [limiting liability], fairly entered into, and where there is no deceit practised on the shipper, should be upheld." *Adams Express Co. v. Croninger*, 226 U. S. 491: "But the rigor of this [common law] liability might be modified through a fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants."

[12] It is deemed unnecessary for present purposes to discuss in detail what constitutes each of these causes.

[13] *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, affirming the general rule of law that unless there is a clear contract to carry through, the liability of each carrier ends with delivery to the next carrier.

The advantage of a public policy,—and it should be recalled that the general common law of liability of common carriers is that as determined by the courts and not by statute, which permits a limitation of liability, was thus expressed by the Supreme Court in *Railroad v. Lockwood* (17 Wall. 357): "A modification of the strict rule of responsibility, exempting the carrier from accidental losses, where it can safely be done, enables the carrying interest to reduce its rates of compensation; thus proportionately relieving the transportation of merchandise and produce from some of the burden with which it is loaded."

With respect to the three heads above mentioned under which common carriers might limit their ability, they had the power in making rules and regulations and in promulgating bill of lading conditions to limit their liability with respect to each or all of them. It was not unusual, in fact, it was the rule, that carriers should limit their liability to their own lines; almost universally carriers limited their liability to one or more of the causes which might cause loss, damage or injury to goods entrusted to them; with respect to many commodities carriers were in the habit of fixing the amount beyond which they would not be liable.[14] In shipments of general merchandise, the limitation of liability was generally confined to the places and causes; in very many instances, however, such as live stock, household furniture, and some of the more valuable articles, the limitation of liability dealt not only with the place and causes but also with respect to the amount or value, being predicated on a stated value per unit.

The effect of the Carmack amendment upon the liability of common carriers as heretofore set forth, may be ascertained both from a reading thereof and a consideration of the decisions of the Supreme Court. It required (*a*) the issuance of a receipt or a bill of lading, (*b*) for the property received for interstate transportation, (*c*) from one state to another, and (*d*) fixed the liability for loss, damage or injury thereto on the initial carrier, (*e*) if caused by it or other handling carrier; (*f*) carriers could not exempt themselves from the liability imposed; (*g*) existing remedies were preserved; (*h*) a remedy over was given the

[14] Formerly, the articles as to which the carrier limited its liability as to amount or value was very large; at the present time the list is quite small; such has been the change as to freight; by express, however, value has been and is the chief element by which to determine rates, and the amount of liability.

initial carrier against the negligent carrier. In the decided cases, which cover all forms of transportation as well as detailed causes for which the carrier was to be held liable, the amendment has been held constitutional, limitations of liability as to causes and amount (but not as to place or negligence) have been held valid and the court has pointed out the advantages arising under the amendment to the benefit of the public of "oneness of charge, continuity of transportation and primary liability of receiving carrier to shipper, with right of reimbursement from the guilty agency in the route."[15]

The changes wrought by the Cummins amendment, the Carmack amendment considered, can be most easily pointed out by a comparison of the language of the two. The italics below represent the words added by the Cummins amendment to the Carmack amendment:

> "That any common carrier, railroad, or transportation company *subject to the provisions of this act* receiving property for transportation from a point in one state *or territory or the District of Columbia* to a point in another state, *territory, District of Columbia, or from one point in the United States to a point in an adjacent foreign country* shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass *within the United States or within an adjacent foreign country when transported on a through bill of lading,* and no contract, receipt, rule (or) regulation, *or other limitation of any character whatsoever* shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; *and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one state, territory, or the District of Columbia to a point in another state or territory, or from a point in a state or territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or*

[15] *Atlantic Coast Line v. Riverside Mills,* 219 U. S. 186: "The rule is adapted to secure the rights of the shippers by securing unity of transportation with unity of responsibility."

injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, however, That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: Provided *further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law," etc.

Unless done in the first proviso above quoted,[16] the Cummins amendment subtracted nothing from the Carmack amendment; changes were by addition, being in the following particulars:— (*a*) broadening the transportation to include intra- and interterritorial, commerce between a state and a territory and between a state or territory and the District of Columbia, intra-District of Columbia and commerce by rail with adjacent foreign countries (Canada and Mexico); (*b*) strengthening, or attempting to strengthen the ways in which limitation of liability might not be practiced, (*c*) prohibiting contracts as to the amount to be recovered in the event of loss of the property, and (*d*) affirmatively prescribing the measure or maximum of liability (when the carrier is liable) by making it for the "full actual loss, damage or injury."

No one can read the first part of the Cummins amendment without discerning that the first half of the first sentence and the second half thereof are much to the same purport. Doubtless

[16] The effect and proper interpretation of this proviso is considered, *infra.*

the true meaning and intent of this sentence can be more readily ascertained by redrafting the sentence into simple language. The redundant and unnecessary language can be ascertained by casting the two halves of the sentence as below, the second half (which is, in a sense, the more comprehensive) being in italics;

Second Half: *And any such common carrier,*
First Half: That ..... any.....common carrier,

railroad, or transportation company.....
railroad, or transportation company subject to the pro-

..... so receiving property for trans-
visions of this act ..... receiving property for trans-

portation from a point in one state, ...territory, or the
portation from a point in one state or territory, or the

District of Columbia to a point in another state or ter-
District of Columbia to a point in another state, ...ter-

ritory.....or from a point in a state
ritory, District of Columbia, or from any point.....

or territory to a point in the District of Columbia, or from any
.....

point in the United States to a point in an adjacent
.....in the United States to a point in an adjacent

foreign country, or for transportation wholly within a terri-
foreign country .....

tory .....
....shall issue a receipt or bill of lading therefor, and

shall be liable to the lawful holder of said receipt or bill of
shall be liable to the lawful holder thereof.....

lading or to any party entitled to recover thereon, whether such
.....

receipt or bill of lading has been issued or not, for the full
.....for .....

actual loss, damage, or injury to such property caused by
..any loss, damage, or injury to such property caused by

it or by any such common carrier, railroad, or transpor-
it or by any.....common carrier, railroad, or transpor-

tation company to which such property may be delivered
tation company to which such property may be delivered

or over whose line or lines such property may pass
or over whose line or lines such property may pass

within the United States or within an adjacent foreign within the United States or within an adjacent foreign *country when transported on a through bill of lading,* country when transported on a through bill of lading, *notwithstanding any limitation of liability or limitation of the* ..... *amount of recovery or representation or agreement as to value* ..... *in any such receipt or bill of lading, or in any contract,* ....and no contract, receipt, *rule, regulation, or in any tariff filed with the Interstate* rule, regulation, or..... *Commerce Commission; and any such limitation without respect* .....other limitation..... *to the manner or form in which it is sought to be made is hereby* ..... *declared to be unlawful and void.*..... ..... of any character whatso- ..... ever shall exempt such common carrier, railroad or trans- ..... portation company from the liability hereby imposed.

If only necessary language be used the first part of the Cummins amendment, including the first proviso, would read as follows:

> 'That any common carrier, railroad, or transportation company (subject[17] to the provisions of this act) receiving property for transportation from a point in one state, territory, or the District of Columbia to a point in another state or territory or from a point in a state or territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a territory, shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon,

[17] This phrase is not necessary, for the description of the places from and to which property is to be transported is, in effect, identical with the language in section 1 of the act. If the phrase "subject to the provisions of this act" be retained, the language following it and describing the kind of transportation could well be omitted.

whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property, caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void; *Provided, however,* That, if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules.'

The foregoing provision and the language just used is for the sake of simplicity only; the language has not been shortened for the purpose of introducing an unusual, strained or particular interpretation. What the author has to say in respect to the first part of the Cummins amendment is as applicable to the longer draft of the act as to the suggested shorter draft.

After the hearing upon the Cummins amendment the Interstate Commerce Commission in its report[18] stated that the more important points which seemed to be surrounded with the most doubt and upon which the opinions of the attorneys so far as they expressed themselves most sharply conflicted were:

"1. If no changes are made in the existing shipping contracts and rate schedules, will the higher rates provided therein automatically become lawfully applicable upon the date upon which the amendment takes effect?" Having in mind that shippers under the uniform bill of lading had the option to accept or reject limited liability of the carrier, a lower rate being applicable to shipments under such liability, the supposed intention of Congress, and that the lawful rates were rates for such limited

[18] No. 49 (*Ex parte*) In re Cummins Amendment, 33 I. C. C. 682.

liability, the Commission held that the amendment did not automatically bring into effect the increased rates as applicable to shipments which are not made subject to the terms of the current bill of lading.

"2. May the carriers lawfully provide in their tariffs and rates schedules that their liability shall be for the full value of the property at the place and time of shipment?" The Commission held that the liability of the carrier may be limited to the full value of the property as of the time and place of shipment.

"3. Does the amendment to the act apply to export and import shipments to and from foreign countries not adjacent to the United States?" This question was answered in the negative.

"4. In the proviso, 'that if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods,' what is the proper interpretation to be placed on the words 'and the carrier is not notified as to the character of the goods'?" The decision of the Commission on this question was predicated upon its interpretation of the word "character." Holding that character as here used must include "the true and actual value as stated by the shipper," substituting "or" for "and," the Commission pointed out that where a rate is lawfully conditioned on value as declared by the shipper it is as much the shipper's duty to declare the true value as it is his duty to declare the name of a commodity tendered for shipment as to which there are differing rates; and said "that if, in any instance, the shipper declares the value to be less than the true value in order to get a lower rate than that to which he would otherwise be entitled, he violates, and is subject to the penalty prescribed in section 10 of the act; subject to the same penalty would be the carrier if, having knowledge that the value represented is not the true value it nevertheless should accept the shipper's representation as to value for the purpose of applying the rate."

"5. Do the terms of the Cummins amendment apply to the transportation of baggage?" This question was answered in the affirmative.

With the tentative views[19] thus expressed by the Commission, which have been summarized above, there has been considerable discord. On the question whether or not the rates for limited liability (No. 1 *supra*) were as a matter of law stricken from

[19] 33 I. C. C. 685; see note 5, *supra*.

all tariffs on the effective date of the Cummins amendment thereby leaving in force and effect only the rates for so-called "common carrier's liability as at common law," many carriers' representatives have disagreed with the Commission but have as yet taken no action seeking an interpretation in accordance with their views. It would seem that, as the liability of the common carriers is of no substantially different kind in the Cummins amendment than in the Carmack amendment, namely, in neither instance can the carrier contract by any means against its own negligence and as the present lower rates are for the same limited liability, the views of the Commission expressed in this behalf are sound.

In deciding that carriers may continue to provide that the amount of their liability shall be dependent upon the full value of the property as of the time and place of shipment (No. 2 *supra*) the Commission seems to have affirmed that carriers might contract with shippers in respect to the measure of damages by which to determine what shall constitute and how shall be ascertained "the full actual loss, damage or injury" to property caused by carrier's negligence. Fluctuating market prices of articles entering into commerce have afforded, and doubtless will afford, opportunities to contest upon this particular point. It is quite true, as the Commission points out, "The loss or damage must, apparently, be either as of the time and place of shipment, time and place of loss or damage, or time and place of destination." The weight of the decisions at common law was undoubtedly as of the place of destination at the time when the goods arrived or at which they reasonably would have arrived. Furthermore, it would seem to be rather the province of a jury under proper instructions of the court to determine what shall constitute the elements or measure of damages in each particular case. Moreover, permission accorded to the carriers to prescribe a rule for determining the measure of damages or the elements of damage seems to be seriously objectionable on the ground that not only would carriers be permitted to legislate in this behalf but also require shippers to accept such legislation even though it be to their serious detriment, and, in effect, contract for the amount of recovery. It will require, should such a condition be placed in the bills of lading,[20] the decision of the highest court to deter-

[20] The Interstate Commerce Commission has no jurisdiction to prescribe bill of lading conditions, but it may make recommendations in respect

mine the constitutionality and lawfulness of such a condition; to the mind of the writer such permission by the Interstate Commerce Commission is against the intent of the amendment, pernicious in its workings and unlawful.

That the amendment does not apply to export and import shipments to and from foreign countries not adjacent to the United States (No. 3 *supra*) is too patent for argument. The territorial scope of the amendment is practically no other or different than that provided for in section 1 of the act. Similarly, the application of the terms of the amendment to the transportation of baggage (No. 5 *supra*) is well founded, in the light of the baggage provisions of the act, the reports of the Commission and the decisions of the courts.[21]

The opinion of the Commission in respect to the meaning of the first proviso (No. 4 *supra*) is, indeed, subject to serious criticism. It considered only the effect of part of the language of the proviso, namely, "that if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods"; in fact, the whole effect of the proviso was determined upon the meaning of the word "character." The Commission invoked but one rule[22] with respect to the interpretation of statutes, reading "and" as "or," remarking that by substituting the latter for the former the meaning of the proviso is reasonably clear, whereas if the letter of the statute is adhered to, the meaning is doubtful and

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thereto; In the Matter of Bills of Lading, 14 I. C. C. 346. Manifestly, the conditions of a bill of lading should be in harmony with the law as laid down by Congress. At the present time, February, 1916, the Commission is holding hearings (I. C. C. Docket No. 4844) to determine what ought to be the changes in bill of lading conditions that the document may conform to the provisions of the Cummins amendment.

[21] "And it is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe, and enforce * * * * * just and reasonable regulations and practices affecting * * * * * the carrying of personal, sample, and excess baggage." (Sec. 1); Regulations Restricting the Dimensions of Baggage, 26 I. C. C. 292; *National Baggage Committee v. A. T. & S. F. Ry. Co.*, 32 I. C. C. 152; *B. & M. R. R. Co. v. Hooker*, 233 U. S. 97.

[22] Perhaps the ignoring of all the canons of interpretation is justifiable, as "when justices of the United States Supreme Court (or any other court) divide on statutory construction, the minority rarely have difficulty in finding well-settled rules of interpretation to support their dissent." *U. S. v. Trans-Missouri Association*, 166 U. S. 290; *Pacific Mail SS. Co. v. Holiffe*, 2 Wall. (U. S.) 467.

difficult to determine.[23] It failed to invoke the numerous canons of interpretation, including the trouble and inconvenience which might arise from its interpretation; possible hardships were not mentioned; the unequal operation on goods for which graded rates are provided and those for which no such rates are in force was not noticed; nor was there seen the absurdity which results if the body of the amendment and the proviso mean the same thing; it did not mention and does not seem to have considered that the purpose of the act to regulate commerce was to further and not hamper commerce[24]; it failed to consider the evident difference between the word "property" in the body of the amendment and "goods" in the proviso[25]; it did not indicate whether or not the proviso was an exception to the general rule or whether it carried a coördinate general rule; it did not take into consideration the custom, as indicated by the bill of lading conditions, which is always a help in ascertaining the true meaning of a statute; nor did it attempt to point out whether the act as a whole, or the first proviso, was enacted for the benefit of the public, nor whether some provisions were in derogation or affirmance of the common law. Though the views of the Commission were tentatively expressed and although perhaps the matter should have been presented in a more formal way,[26] consideration of some of these matters might well have been given.

Agreement with the meaning of the word "character" as held by the Commission is a matter of relatively little importance, because so far as it is interpreted, the interpretation is to an extent sound. The Commission said that the word "character" as in the proviso "clearly relates primarily to value, or to those qualities which affect value." In the transportation sense, it means more; it means in addition to "value," "great value" and as well "subject to extra risk." In *Railroad v. Lockwood*, 17 Wall. 357, goods of a particular class were referred to,—"But

[23] To the mind of the writer, the substitution of "or" for "and" does not here clarify the language and intent of Congress. If the proviso is to be read as enacted it makes the condition on which carriers may act a single one; if, however, the word "or" be substituted the conditions are two in number and the carrier may act if one only be present.

[24] *T. & P. Ry. v. I. C. C.*, 162 U. S. 197.

[25] In transportation parlance there is a wide distinction between "property" and "goods," the former being more comprehensive than the latter.

[26] Suggested in the report, 33 I. C. C. 698.

the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened," etc. Manifestly, Mr. Justice Bradley had in mind that the word "character" contained at least two elements, in the disjunctive: "great value or subject to extra risks." Many articles on which higher rates are demanded (or were demanded) were not of great value, e. g., molasses and other liquids, which are liable to ferment, are of no great value but are subject to extra risk, not only as to their own loss or damage but also as to damage to other articles in the same car. So also, many articles of great value are not subject to extra risk or hazard. It is submitted that the word "character" means either (*a*) of great value or (*b*) of extra risk.

Keeping in mind the three fields within which carriers might under the general common law limit their liability and also having in view the denial by the Carmack amendment of some of these respects, it behooves one to determine the crucial provisions, the essential mandates, of the Cummins amendment. Analytically stated the amendment provides:

1. The interstate common carrier
2. shall issue a bill of lading for property received
3. and shall be liable (whether or not bill of lading is issued)
4. to the real party in interest
5. for the full actual loss, damage or injury to property,
6. caused by it or other handling common carrier
7. Notwithstanding (*a*) any limitation, or
   (*b*) limitation of the amount of recovery, or
   (*c*) representation or agreement as to value:
8. *Provided, however,* That if the goods are
   (*a*) hidden from view by wrapping, boxing, or other means, and (or?)
   (*b*) the carrier is not notified as to the character of the goods,
9. the carrier may require the shipper to
10. specifically state in writing
11. the value of the goods,
12. in which event the carrier shall not be liable for a greater amount than so stated

13. and the Commission may establish and maintain[27] rates
14. dependent upon the value of the property
15. as specifically stated in writing by the shipper.
16. Such rates shall be published as other rates.

The chief objection to the Commission's interpretation of the proviso now under consideration concerns the duty of carriers to provide a regulation, requiring that shippers must state in writing the actual or true value of the goods to be transported, if and when the carrier has elected to provide graded rates dependent on value. The Commission has tentatively so stated the carrier's duty. The effect has been to require dealers in articles, the rates on which are predicated on different values, to declare such a value that thereunder the movement thereof has been seriously impeded; inconvenience and annoyance have been caused to the users of transportation facilities; the right to insure valuable shipments, while not denied as a matter of law is as a matter of fact. A passenger accompanied by his baggage which exceeds the usual value of $100.00 is required to pay excess rates. The users of express facilities instead of valuing parcels at $50.00 each,—the usual express valuation, and carrying his insurance, as has been largely the custom, must pay greater transportation charges; these transportation charges far exceed the transportation charges with $50.00 limitation of liability per package plus the insurance charges for full value. Where lines of trade and industry use to any considerable extent transportation by freight and the carrier has provided graded rates according to values, the previous custom of a stated valuation per unit has been changed so that instead of the stated valuation, much greater rates are required for the transportation of goods which in truth exceed in value those for stated valuation. Not infrequently the shipper either by freight or express, and more frequently the passenger with his baggage, does not know and cannot tell the actual or true value of the shipment; the difficulty of stating actual or true values is in many instances insurmountable. Again, if the shipper or passenger shall state a value in excess of a true value at the time of making the shipment, he could not recover that amount but only an amount determined by the verdict of a jury under proper instructions of the court; in the supposed case he would naturally be limited,

[27] The use of the verbs "establish and maintain" is not accurate. The power of the Commission is to "determine" and "prescribe" (Sec. 15); the former is a judicial word and the latter a legislative one.

not to the valuation he had stated although the property might be to him worth such amount. Moreover, the present interpretation produces the result that the policing of shipments, a duty cast upon carriers, could not be effectually done. Graded rates are provided for but a few articles; many other similar articles, being of high value or subject to serious market fluctuations, are carried at one rate. To enforce the suggested rule must necessarily produce unjust discrimination against the article for which graded rates are carried.

The true meaning of that portion of the Cummins amendment which fixes the liability of carriers would seem to be: *The rule.* That for loss, damage, or injury to property transported by an interstate carrier caused by it or other handling carrier, the initial carrier shall be liable for the full actual loss, damage, or injury notwithstanding any attempt in any way, method or manner to limit the liability or contract in respect to the amount of recovery. *The exception.* But under certain circumstances, to-wit, if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, and the carrier has elected to make graded rates dependent upon the value of the property (or may hereafter so elect), then and under such two contingencies, the shipper may be called upon to specifically state in writing the value of the goods, which value as so stated shall constitute the measure or limit of recovery.[28]

It seems clear that for shipments of property the liability is for the full actual loss, damage, or injury; and it is equally clear that subject to the election of the carrier to provide graded rates for the shipment of concealed goods, the shipper is permitted to fix the value of the shipment for transportation purposes. If the proviso requires the stating of true or actual value it is not an exception to the general rule provided in the body of the amendment; in the latter the measure of liability is the full actual loss, damage, or injury, and in the former, if the

[28] In cases where there is an agreed amount of recovery in the event of loss, damage and injury, the ground on which the shipper cannot recover a greater amount is that of estoppel (*Missouri, Kansas and Texas Ry. v. Harriman*, 227 U. S. 657; *Wells Fargo & Co. v. Neiman-Marcus*, 227 U. S. 469); where the amount is fixed in the tariffs, not only is estoppel a ground but also there must be a strict observance of the tariffs by the shipper and carrier (*Atchison, Topeka & Santa Fe Ry. v. Robinson*, 223 U. S. 173, and cases there cited).

shipper must state actual or true value, the measure of liability is none other than the full actual loss, damage, or injury to goods. Naturally Congress cannot have imputed to it an intent to pass a positive enactment and add a proviso which, while in somewhat different language, would mean in truth and in practice the same thing; such a thought would be averse and contrary to all methods and canons of interpretation; this proviso as with other provisos must mean something different or other than that which precedes it.

It has long been the custom for carriers to limit their liability; such limitations of liability, except as against carrier's negligence, have been upheld whenever no imposition has been practiced by the carrier and there has been "a fair, just and reasonable agreement." All of the cases prior to the Carmack amendment have turned upon the nature of the agreement for limited liability, notice of the limitation, and the policy of the state with respect to such limitations. Since the Carmack amendment and even since the Elkins act all parties have been bound by carrier's published tariff provisions and the law has presumed that neither the carrier nor the shipper could violate the rules and regulations carried in such published tariffs.[29] It is on this ground that the limitations in bills of lading, schedules, tariffs and classifications have been upheld.

Heretofore limitations have been promulgated by carriers; shippers were forced to abide by them or file formal complaint before the Interstate Commerce Commission attacking their reasonableness. Congress seems to have had in mind that if goods are concealed and their character is not known to the carrier and carriers elect to provide graded rates thereon according to value, the shipper may limit the liability of carriers, and at the same time to have provided that carriers shall not in any way limit their liability or contract for the amount of recovery.

The number of articles for which carriers by freight have provided graded rates is very small; by express, on the other hand, rates are predicated particularly on value[30]; rates for baggage are included in the passenger fare but increased or excess baggage rates are carried in carriers' tariffs for baggage of

[29] *Atchison, Topeka & Santa Fe Ry. v. Robinson,* 233 U. S. 173, and cases there cited.

[30] Express companies' bills of lading are usually headed: "This company's charge is based upon the value of the property, which must be declared by the shipper."

greater than the value per unit, generally $100.00 per first-class ticket.

That part of the decision of the Commission which lays down the law that if one shall state less than the actual or true value for the purpose of getting a lower rate, he shall be subject to the penalties of section 10 of the act, is open to criticism. Section 10 seeks to prevent, under heavy penalty, one shipper securing an undue preference or advantage,—not to say rebate, in the describing of property for transportation; certain forms of misdescription are prohibited. But in the pending matter a form of misdescription (as it were) is allowed and permitted under certain circumstances by a later act, to-wit, the stating of one element of description of the property, the value; the purpose of it "is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care and management of that which is entrusted to him. It is to describe and define the subject matter of the contract so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession and for which he must account in the performance of his duty as a carrier."[31] The carrier has provided graded rates; if it shall be held for one amount, its rate is a certain figure; if held for larger amount, it demands a greater rate. A shipper has his choice and both rates are open to all. And his choice or election is now no different from what it was in the past. The shipper has now become the active and inducing party to the contract, while formerly he was the passive, if not the inactive, party; under the proviso of the amendment the carrier is called upon to notify the shipper that graded rates have been provided, thereafter the shipper fixes and determines what value he shall put upon his goods. If the lower rate and lower valuation shall be selected by one shipper and another shall select the higher rate with corresponding higher valuation, each may and probably has acted in good faith and according to his own judgment as shall befit his individual circumstances. Such difference in election has never heretofore been considered unlawful. If it is now to be considered unlawful there is a complete reversal of all previous decisions; if the stating of other than true or actual value is now a crime under section 10, the same universal practice and custom has been a crime ever since the enactment of the section.

[31] *Bernard v. Adams Express Co.*, 205 Mass. 254, cited with approval by the Supreme Court in *Adams Express Co. v. Croninger*, 226 U. S. 491.

Where for the transportation of a particular commodity there have been provided graded rates, the several rates are open to each and every shipper of the article. The lowest rate must necessarily include and be presumed to include the charge for transporting the article (cost of transportation to the carrier plus a profit) plus a charge for an insurance against loss, damage, or injury caused by the carrier. This rate would not include any insurance against the loss, damage, or injury to goods occasioned by causes other than carrier's negligence; similarly, the next highest rate would not include any insurance against such causes; and so, also, if there should be provided several graded rates for increasing values. If the shipper be required to specifically state actual or true values he necessarily now pays for something which he does not get, namely, a rate or charge for an unassumed risk; a statement that the more expensive horse or article, say of the value of $250.00, is more liable to loss, damage, or injury by carrier's negligence than if worth $150.00, would not be borne out by the facts; the doctrine or law of chance would apply to things of the same class alike independent of their value. This law or doctrine of chance would not, however, be applicable to all carriers; the chances that the A. & B. Railroad would be negligent are far greater (or less) than if the L. & M. Railway were the prospective carriers.

The requirement that actual or true value must be stated nullifies, if it does not deny, the right of shippers to carry insurance on goods while in transit. Insurance is much less annoying in the event of loss than the making of claims against carriers; there is no great delay in settlement, no jewing down of the amount due, no attempt to avoid liability, no dispute as to causes. The insurance usually carried covers loss, damage, or injury from any and all causes, including carrier's negligence. A part of the transportation charge is for carrier's negligence; so that the shipper carrying a policy of insurance pays two charges for total indemnity, an amount in the rate for transportation against carrier's negligence and another amount in the insurance premium for that and other causes. When the shipment is actually and truly valued, there being no more chance of loss than if "released," the added rate (whatever the amount) cannot be a payment for added insurance for the reason that the indemnity is only against one of several possible causes, to-wit, carrier's negligence. Let this instance explain: Assume a shipment of silk (for which in certain territory there are graded rates), the actual value

of which is $3.00 per pound. Custom for many years released silk to $1.00 per pound. The rate at the latter value is, say, 50 cents per hundred pounds; at true or actual value it would under tariff provisions be 75 cents. The difference ostensibly represents an insurance against carrier's negligence,—and yet there is no possibility of any difference in that respect in the two shipments. Each is equally liable to loss, damage, or injury due to carrier's negligence. The shipper pays for nothing more in the second than in the first case; in each the indemnity is against carrier's negligence. Assuming two such shipments, he cannot recover, in the event of carrier's negligence (on the ground of estoppel) more than the amount at which the shipment has been valued; in an actual or true value case, he can recover full value, if lost by the same cause. But in both instances the shipper frequently carries insurance. With insurance in both cases and assuming loss by reason of carrier's negligence, the goods being released, the amount which could be recovered would be received from two sources: a portion from the carrier and a portion from the insurance company; in the true or actual value case the amount recovered would be either from the insurance company or from the carrier, the right of subrogation being preserved. With insurance in both cases and loss being occasioned by acts other than carrier's negligence, the amount recovered in both the released case and the true value case would be from the insurance company. The notorious trouble and annoyance in securing claims from carriers and the difficulty in satisfactorily proving whether the loss, damage, or injury was occasioned by carrier's negligence or other causes, leads one to believe that prudence demands the carrying of insurance with a right on behalf of the shipper to fairly stipulate for the amount of recovery, if and when the goods are concealed.

But it may be urged that the greater the value of an article the greater the value of the service and hence a greater rate may be reasonable. Aside from a consideration of this academic and economic statement (interesting but not of practical use), present rates are not so constructed.[32] It is true that value is one element of freight rates but such rates are not measured only by that standard; value is an important element in express rates but other elements serve to fix the reasonableness thereof.

[32] For example: Bar iron and steel take the same rates as expensive laundry and electrical machinery. The elements of rates exceed 30 in number.

It seems clear that the proviso does not by its language, whether liberal or strict rules of interpretation be used, require shippers to state actual or true value of hidden or concealed goods. To justify such an interpretation as has tentatively been given the proviso, one must insert in front of the word "value" the words "actual or true" and strike therefrom what would be surplusage the words "and the carrier shall not be liable beyond the amount so specifically stated." To sustain such interpretation words must be both read out and read in.

Nor can it be urged successfully that the making of graded rates and shipments thereunder tends to a want of care by the carrier. This question is foreclosed by the decision in *Hart v. Pennsylvania Railroad,* 112 U. S. 331,—in which the court also stated the public policy which justifies limitation of value of shipments. The court said:

> "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and to the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefits of the contract if there is no loss, and to repudiate it in case of loss."

The Interstate Commerce Commission clarified and modified its tentative views (33 I. C. C. 682) in a circular from the secretary's office[33] and in its report in *Iowa State Board of Railroad Commissioners v. Atchison, Topeka & Santa Fe R. Co.,* 36 I. C. C. 79.

Some doubt apparently existing whether or not the stating of value for all shipments was required by the Cummins amendment as interpreted by the Commission, the circular above referred to said:

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[33] The circular was issued August 17, 1915.

> "There is no provision in the act to regulate commerce, including the Cummins amendment, that requires a declaration as to the value of property shipped in interstate commerce. Nor has the Commission issued any ruling that requires such declaration.
>
> "The Cummins amendment does, however, provide that if the goods are hidden from view by wrapping, boxing, or other means and the carrier is not notified as to their character, 'the carrier may require the shipper to specifically state in writing the value of the goods.' In such cases rates and charges for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper, may be established and maintained."

The prerequisites for the application of section 10 were stated to be:

> "First, the election of the carrier to require a shipper to state in writing the value of the goods; second, the existence of graded rates or charges dependent upon the value of the property shipped, and, third, that the shipper shall knowingly and wilfully by false statement as to the value obtain or attempt to obtain transportation of such property at less than the regular rates."[34]

In its report above referred to in addition to deciding that the whole system of released rates based on agreed valuations as distinguished from actual value had been abolished, the Commission fixed and prescribed "average values" for live stock.[35]

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[34] A strange if not uncertain part of this statement is that where there have in the past been graded rates, each and all of them have been conceded "regular," and not only such but also lawful, proper and beneficial.

[35] The syllabus reads:—

> 1. The Cummins amendment has in effect abolished in interstate commerce the whole system of released rates based on agreed valuations as distinguished from actual value.
>
> 2. Applying to the present record the principles enunciated in the Cummins amendment, 33 I. C. C. 682: (*a*) That, taking each class of animals by itself and making due allowance for the minimum, maximum, and average values of each as shown by this record, the scheduled valuations carried by these defendants in their live stock shipping contracts are unjustly and unreasonably low and not representative of the average actual values of the animals shipped thereunder; (*b*) that defendants' rates for the transportation of certain specified animals, the actual values of which do not exceed the amounts set forth in the report, are, and will be for the future, unreasonable to the extent that such rates exceed the present rates based upon the present scheduled valuations; (*c*) that defendants' excess rates for excess valuations are unjustly and unreasonably high; and (*d*) that reasonable rates for the transportation of any animal of actual value exceeding the

Manifestly, this is not in strict conformity with its former decision in No. 49, Ex parte, unless shipments of live stock fall under the body of the amendment as property and not under the proviso as hidden or concealed goods. "Goods" in the transportation sense does not generally include live stock. And, yet, the body of the amendment does not provide for, but in truth prohibits, limitations of liability and contracts for amount of recovery! The rules laid down seem to have been made *ex necessitate rei.*

The courts have always appreciated the advantages of limiting the liability of carriers by contracting for the amount to be recovered whenever the agreement in that behalf has been "fair, reasonable and just"; in *Adams Express Co. v. Croninger,* 226 U. S. 491, the court said:

> "It has, therefore, become an established rule of the common law as declared by this court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates proportioned to the amount of the risk."

The advantages of such a public policy has been referred to in an excerpt from *Railroad v. Lockwood, supra;* the same thread runs through all of the more recent cases including those interpreting the Carmack amendment. Such a public policy permits carriers to make rates proportioned to the risk assumed, relieves transportation of a portion of the charges therefor, helps to reduce the cost of living and is in furtherance of commerce.

Fixing the amount of recovery for shipments lost, damaged or injured has frequently been considered a limitation of liability. The recent cases, however, construe such an agreement as a contract as to what the property is in reference to its value and not as a limitation of liability. In *Adams Express Co. v. Croninger,* (226 U. S. 491), the court approved the following language from *Bernard v. Adams Express Co.,* 205 Mass. 254, as follows:

> "But such a contract as we are considering in this case is not an exemption from liability for negligence in the management of property within the meaning of the

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amount specified in the report will exceed said present rates by not more than 2 per cent. of said present rates for each 50 per cent. or fraction thereof of actual value over and above that named in the report.

> statute. It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligations in the care and management of that which is entrusted to him. It is to describe and define the subject matter of the contract, so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty as a carrier. It is not in any proper sense a contract exempting him from liability for the loss, damage or injury to the property, as the shipper describes it in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service and for the risk of loss which the carrier assumes."

The court reached the conclusion that the provisions of the Carmack amendment forbidding exemptions from liability is not violated by a contract in an express receipt or bill of lading limiting liability to an agreed value of $50.00. The Cummins amendment undoubtedly attempted to prohibit such contracts by the words "notwithstanding . . . . (any) limitation of the amount of recovery . . . . in any such receipt or bill of lading or any contract, rule, regulation, or in any tariff," etc.

Because of the close relation between the Carmack amendment and the Cummins amendment the decisions under the former may be taken as a safe guide for what will ultimately be determined by decisions under the latter, certainly in so far as the latter reiterates the former. Congress had full and complete power to legislate respecting the liability of common carriers.[36] Such enactments do not infringe any of the constitutional provisions.[37] Such legislation supersedes all special regulations and policies of states upon the subject and as well contracts of carriers with respect thereto[38]; but a state statute may for reasons of internal policy by general statute provide for an attorney's fee as a part of the costs and not infringe the Federal law, Congress not having spoken on the subject.[39] So far as the body of the Cummins amendment is concerned transportation of a broader

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[36] *Atlantic Coast Line v. Riverside Mills,* 219 U. S. 186.

[37] *Atlantic Coast Line v. Riverside Mills, supra,* followed in *Galveston, Harrisburg & San Antonio R. R. Co. v. Wallace,* 233 U. S. 481; *Adams Express Co. v. Croninger,* 226 U. S. 491.

[38] *Adams Express Co. v. Croninger, supra.*

[39] *Missouri, Kansas & Texas Ry. v. Harris,* 234 U. S. 412.

kind will be subject to its provisions (as heretofore pointed out), and carriers are prohibited from contracting in respect to the "amount of recovery" in the interstate shipment of property, but if the goods are hidden or concealed and the carrier is not notified of the character of the goods and has elected to provide graded rates therefor, the shipper may contract in writing in respect to the amount of recovery by stating the value of the goods as a part of the description and definition thereof.

JOHN B. DAISH.

DENVER, February, 1916.